

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: March 26, 1998

TO: Ralph R. Tremain, Regional Director, Region 14

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Always Care Home Health Services, Case 14-CA-24788

506-6080-8700, 506-6090-3300, 512-5012-8360, 512-5072-0200

This case was resubmitted for advice regarding whether the Employer violated Section 8(a)(1) by failing to respond to the Union's request for a list of employee names and addresses prior to the direction of an election. ⁽¹⁾

FACTS

Always Care Home Health Services ("Employer"), a corporation with its principal office located in Olivette, Missouri, is engaged in the business of providing home health care. The Employer maintains two additional offices in Hillsboro and St. Charles, Missouri. The Employer's service area extends over three contiguous counties (St. Louis, St. Charles, and Jefferson) in the greater St. Louis, Missouri area. The Employer employs approximately 450 employees who provide home maker and personal services to the Employer's clients at their homes. Around 250 of those employees receive assignments from the Employer's Olivette office. Approximately half of the employees regularly report to the Olivette office on Fridays to pick up their paychecks, ⁽²⁾ and employees in groups of 10-15 report to the Olivette office for "in service" training. ⁽³⁾ In addition, employees visit the Employer's three offices to pick up supplies and drop off time sheets.

SEIU, Local 880 ("Union") started to organize the Employer's employees on April 1, 1997. ⁽⁴⁾ On June 25, the Union filed an election petition in Case 14-RC-11806 to represent the 250 home makers and personal care workers who report to the Employer's Olivette office. The Employer objected to the Union's petition, contending that the only appropriate unit includes the 450 employees at its three offices. ⁽⁵⁾ The Union's representation petition was supported by 122 signed authorization cards. ⁽⁶⁾ The Union obtained these signatures in the following manner. After the Union was contacted by an employee, in February non-employee Union organizers visited the Olivette office and wrote down the license plate numbers of 70 cars that entered the facility. ⁽⁷⁾ Out of those 70 license plates, the Union obtained 53 addresses, an unspecified number of which were "bad" in that the cars were not owned by employees of the Employer. Those 53 addresses resulted in 18 Union contacts with employees, 14 of whom were interested in the Union and formed the nucleus of the 28-employee Union organizing committee. The Union was able to contact 6 additional employees due to the efforts of those 14 employees.

In May, an organizing committee member obtained an outdated employee list, dated July 26, 1996, from a former employee. The list contained 565 employee names, addresses, and telephone numbers. Of those listed employees, 137 were no longer employed by the Employer and 253 had moved. ⁽⁸⁾ 22 of the former employees signed Union authorization cards. Of the 175 listed employees still working for the Employer for whom there were current addresses, the Union was able to obtain 65 signed authorization cards.

In sum, of the 122 pre-petition authorization cards the Union obtained, 21 were due to the organizing committee, 14 (who formed the organizing committee) resulted from recording license plates, and 87 were a result of the outdated employee list (22 of whom are now former employees). Subsequent to filing the representation petition, the Union obtained 18 additional signed authorization cards. The Union estimates that 84% of the employees it contacted signed cards.

Since the Employer contended the appropriate unit was much larger than the unit petitioned for by the Union, the Union

continued to organize. It visited homes of employees identified on the outdated list, resulting in 9 additional signed authorization cards. ⁽⁹⁾ The Union contacted three employees through other employees, and four employees through visits to clients of the Employer. ⁽¹⁰⁾ In addition, on July 3 (presumably an early pay day given the July 4 holiday), non-employee Union organizers solicited and distributed handbills at the Olivette office for approximately three hours. They recorded 30 license plates entering the Olivette office. These 30 license plates resulted in 9 "good" addresses which the Union contacted, resulting in 2 signed authorization cards. At that point, the Union decided not to perform any additional license plate checks because it resulted in only a "20% contact rate." While two non-employee Union organizers were soliciting at a nearby public bus stop on July 3, they were photographed by the Employer. When the organizers approached employees, the Employer informed the organizers that they could not solicit at the bus stop because it was private property, and the Employer called the police. The police told the organizers they could solicit at the bus stop, but they could not stop cars going in and out of the parking lot because that would be dangerous. By not being able to stop cars, the organizers were unable to communicate with 90% of the occupants of the cars entering the office. Several of the employees approached by the Union that day stated that the Employer had informed them not to talk to the organizers. Since the Employer had called the police to run off the non-employee Union organizers, the Union did not utilize employees during non-working time at the Employer's office during check pickups because the Union did not believe the Employer would permit it. ⁽¹¹⁾

On July 11 or July 18, a pay day, non-employee Union organizers solicited and handbilled at the Employer's St. Charles' office for about six hours, and observed approximately 10 employees entering the facility. In a similar attempt at the Employer's Hillsboro facility on a payday sometime in July, the Union did not observe any employees visiting the facility.

On July 15, an employee on the Union's organizing committee sent a letter to the Employer on behalf of the Union requesting that a list of employee names, addresses, and home telephone numbers be sent to her "so that we can contact them about choosing a representative regarding our wages and working conditions." ⁽¹²⁾ The Employer did not respond to this request.

On November 21, the Union observed 197 employees entering the Employer's three offices: 149 at Olivette, 43 at St. Charles, and 5 at Hillsboro. The Union did not attempt to contact any of these employees. Nor did the Union record any license plate numbers due to its prior low contact rate based on license plates.

On January 23, 1998, a pay day, the Union distributed handbills to, and counted employees entering, the Olivette and St. Charles offices. At Olivette, the Union distributed handbills to 66 of the 107 cars entering the parking lot, while at St. Charles the Union distributed handbills to 12 of the 21 employees who entered the office. Overall, the Union observed 134 employees entering the two offices. ⁽¹³⁾

The Union did not utilize any mass media in its organizing campaign as its media consultant indicated that such advertisements would not be productive because: (1) workers live in a 7 county area, making it hard to reach them with billboards; (2) it takes 5 to 7 advertisement contacts before people respond, and thus would be expensive; and (3) due to variance in employee age and demographics, the Union would need to run advertisements on several radio stations, and one large radio station had been reluctant to run the Union's organizing advertisements in the past. Finally, one of the Union organizers felt that newspaper advertisements would not be effective due to employees' education levels and social backgrounds.

The Employer contends it is not required to provide the Union with a list of its employees and their addresses because the Union has not demonstrated that it has no alternative means of reaching employees. Thus, the Employer asserts that the support which accompanied the election petition belies such a contention. It further notes its employees are located in a centralized metropolitan area, which permits the Union to take advantage of such alternative means of communication as local television, newspapers, billboards and radio, which the Union has not utilized. The Employer also contends that the majority of its employees go to its offices every week of the year to pick up paychecks and to drop off paperwork. Each of those offices is a one-story building with an adjacent parking lot that gives the Union easy access to employees.

The Union argues that it is entitled to a list of the names and addresses of current employees in order to communicate to employees that an organizing drive is underway and to allow them to discuss it among themselves

because employees live and work in geographically dispersed areas, employees never meet in groups of over 10-15 persons at

Employer offices, only a portion of employees pick up their checks at the Employer's offices on specific days, and because the Employer has successfully kept Union organizers off of Employer property and the property of the Employer's clients.

ACTION

We conclude that, absent withdrawal, the Region should dismiss the charge because the Union has not demonstrated that it cannot reach a sufficient number of employees to achieve a necessary showing of interest in the representation proceeding which would entitle the Union to a list of names and addresses of all employees. Specifically, given the Union's prior success in identifying and contacting employees by recording license plates entering the Employer's offices, handbilling outside the Employer's offices, and contacting employees on the outdated list, and given the Union's lack of evidence that such means or other available means will not be successful in the future, the Union failed to show that the employees are: (1) inaccessible to the Union and other employees based on their geographic dispersion and working organization; and (2) otherwise impossible to organize otherwise.

A. Traditionally, a Union Must Await an Election to Obtain an Employee List

Under traditional Board law, a union is entitled to a list of bargaining unit names and addresses (a so-called "Excelsior list") only after an election has been directed or after the parties have consented to an election. ⁽¹⁴⁾ The purpose of an Excelsior list is to allow employees to make an informed choice by "maximiz[ing] the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation." ⁽¹⁵⁾

B. Only When Employees Are Inaccessible and Impossible to Organize can a Union Seek an Employee List Prior to an Election

However, in *Technology Service Solutions*, ⁽¹⁶⁾ the Board indicated that an employer's failure to respond to a union's request for names and addresses of bargaining unit employees prior to either the direction of an election or a consent election -- thus, before a union has made a showing of interest -- may constitute a violation of Section 8(a)(1) where an organizing union is unable to communicate with employees or where employees cannot communicate with one another.

The employer's operations in *Technology Service Solutions* were spread out over eight states, which the Board held constituted the appropriate unit. ⁽¹⁷⁾ Its employees generally worked alone out of their vehicles and homes and at customers' locations, and, with the exception of an annual meeting, did not otherwise regularly gather at any common location. The Board rejected the ALJ's basis for dismissal that the employees "are not inaccessible and that organizing them is not impossible," and consequently remanded the case to the ALJ. ⁽¹⁸⁾ Chairman Gould, in his concurring opinion in *Technology Service Solutions*, concluded that an employer may be required to provide a union with a requested list of names and addresses where the union's ability to communicate with employees is restricted by an extreme scattering of the work force. ⁽¹⁹⁾ The Chairman noted that the employer's unusual operational structure caused the employees to be so dispersed and isolated from each other that there was little opportunity for them to discuss organization among themselves or for a union to communicate with them. ⁽²⁰⁾ Moreover, Chairman Gould observed that the union had demonstrated that even with its most intensive efforts, it had "no way to identify or contact the unit" (emphasis added), and that attempting to reach a unit of 173 employees in seven states by mass media would be "ludicrous, given the vast number of print, television and radio media outlets in those states, the Union's inability to know which ones of them the CSR's read, watch, or listen to, and the tremendous expense of mounting such an advertising campaign." ⁽²¹⁾

The linchpin of the General Counsel's theory in *Technology Service Solutions* and the Chairman's concurring opinion is that employees have the Section 7 right to discuss organization among themselves and the right to know about unionization from union officials. ⁽²²⁾ Thus, where an employee requests names and addresses of fellow employees so that employees can contact other employees about organizing, the initial inquiry is what are the union's and the employee's abilities to identify and communicate with other employees.

C. The Union has not made out a Prima Facie Case that it is Entitled to an Employee List prior to an Election

Unlike the record in Technology Service Solutions, the Union here has not demonstrated the inability of unit employees to exercise either the right to learn from Union officials about Union representation or the right to discuss this issue among themselves.

1. The Union has not Demonstrated that the Employees Here are Inaccessible

As an initial matter, the instant case dramatically differs from Technology Service Solutions with regard to the degree of employee inaccessibility. Here, the geographical dispersion of employees involves at most 7 contiguous counties in one metropolitan area within one state, ⁽²³⁾ while in Technology Service Solutions ⁽²⁴⁾ the appropriate unit covered 8 large Western states. Moreover, in the instant matter nearly half the Employer's workforce of 450 employees pick up their paychecks at the same location on the same day of the week, and groups of 10-15 employees gather at the Employer's offices for training. In contrast, in Technology Service Solutions, ⁽²⁵⁾ nearly all employees lived and worked alone in different areas, did not report to their employer's offices in the normal course of business, gathered together at most once a year for regional meetings, and neither the union nor individual employees could identify employees in other states. ⁽²⁶⁾

2. The Union has not Demonstrated that the Employees Cannot be Organized

The instant matter also differs from Technology Service Solutions regarding the impossibility of organizing employees. In Technology Service Solutions ⁽²⁷⁾ the union presented evidence that neither the union nor employees were able to locate any employees outside of the 63 employees in Colorado (in a 150-employee unit), and 38 of the employees within Colorado were only located due to one employee's ingenuity. By contrast, in the instant matter the Union has successfully communicated its organizing message to significant numbers of employees using organizing means already available to it, i.e., recording license plates and handbilling on or near the Employer's property, and has not demonstrated that future use of those previously successful means of communicating with employees would be futile.

a. The Union has Demonstrated its Ability to Communicate with its Employees Using License Plate Drives and Handbilling

Based on the Union's statement that 84% of employees it personally contacted signed cards, and that 140 cards were signed, the Union has been able to personally communicate its message to 167 employees (out of a 450 employee unit). ⁽²⁸⁾ Of that number, 27 of the Union's direct contacts with employees were obtained from two days of recording 100 license plates (a 27% contact rate). These employees led to additional employee contacts, resulting in 14 additional signed authorization cards. ⁽²⁹⁾ In addition, the Union has successfully communicated its message through non-employee handbilling near the Employer's property. The Union reached an unspecified number at the Olivette office on July 3, and spoke to at least several employees personally on that date (as those employees related that the Employer had told them not to speak to the Union organizers). The Union also reached approximately 10 employees at the St. Charles office on July 11 or July 18. Finally, on January 23, 1998, the Union distributed handbills to 66 of 107 cars entering the Olivette office's parking lot, and 12 of the 21 employees entering the St. Charles office.

b. The Union has not Demonstrated that it Would be Futile to Continue to Use its Prior Successful Methods of Communicating with Employees

Since the Board has only recently indicated that a union may be entitled to an employee list prior to the direction of an election or a consent election, there is no Board law governing the situation here, where the Union has already been successful in communicating with a substantial number of employees. However, the Board's decisional law governing union access to employer property is instructive. Those decisions hold that a union must demonstrate that its prior successful means of communicating with employees would be futile in the future before the Board will grant a union access to the employer's premises. ⁽³⁰⁾ In its Lechmere ⁽³¹⁾ decision, for example, the Supreme Court stated that the "accessibility [to employees by the union] is suggested by the union's [prior] success in contacting a substantial percentage of them directly, via mailings, phone calls, and home visits." Based on this accessibility, and the availability of another reasonable alternative means of communicating with employees (signs near the employer's parking lot), the Court denied non-employee Union organizers

access to the employer's property.⁽³²⁾ Moreover, the Board has held that reasonable alternative means of communication need not be "the most effective means."⁽³³⁾

Similarly, in SCNO Barge Lines,⁽³⁴⁾ the Board denied a union access to employees onboard the employer's boats where the union had "achieved a fair measure of success" in communicating with employees in the past, because "the [u]nion simply did not make sufficient efforts with the means at hand to show that those means were unworkable."⁽³⁵⁾ The Board found it significant that -- through telephone calls and home visits based on a list of the names and addresses of employees -- the union had "managed to communicate with a significant number of the crewmen" who lived in geographically dispersed areas, even absent ship access. Indeed, the union's efforts were so successful that it "succeeded in filing a representation petition necessary for the holding of an election, and, therefore obtained the requisite authorization card signatures from at least 30 percent of the crewmen. . . ."⁽³⁶⁾ It was because of the union's prior "success in contacting the Respondent's crewmen . . . [that it had] a particular obligation . . . [to] establish[] [the] absence of alternative means, either to show that the Union tried unsuccessfully to reach the crewmen through telephone calls and home visits or to demonstrate concretely why such efforts would not have worked."⁽³⁷⁾ In addition, the Board noted that the union had an opportunity to conduct a mail campaign.⁽³⁸⁾ Applying the principles inherent in Lechmere and SCNO Barge Lines, we conclude that the Union has not demonstrated that license plate observations and handbilling would not be successful methods of communicating with (or among) employees in the future.

Although it is conceivable that future license plate observations would not yield additional as-yet-uncontacted employees if the same employees visit the Employer's offices each pay day, the Union did not make this argument.⁽³⁹⁾ Indeed, the Union did not even attempt to ascertain if the same employees visit the Employer's offices each week, though it could easily have done so. Specifically, on November 23, 1997 and January 23, 1998 the Union observed 197 and 134 employees entering the Employer's offices, respectively, but it did not record one license plate to compare against its previous lists. Since there is no evidence that additional license plate observations would result in the Union communicating its message to the very same employees it previously contacted, we conclude that the Union thereby could communicate with additional employees.

Moreover, the Union has also failed to establish that additional handbilling would be futile. As an initial matter, the Union could have solicited the 197 employees it observed entering the Employer's three offices on November 21.

In addition, handbilling could have been performed by employees on the Employer's parking lots and walkways (not just non-employee Union organizers), enabling employees to communicate with each other regarding the merits of Union representation. Although the Union's rationale for not using employees to handbill was its concern that the Employer would not permit employees access to or near its property because non-employee organizers had been so excluded, Board law allows employees greater access to their employers' property than non-employees. Specifically, In Tri-County Medical Center, Inc.,⁽⁴⁰⁾ the Board held that, except where justified by business reasons, off-duty employees may solicit other employees outside their employer's premises on its parking lots and walkways. This is true even if the employees work at another employer location.⁽⁴¹⁾ Since the Employer has not maintained that employees may not solicit other employees on its parking lots and walkways, the Union has not demonstrated that future handbilling would be futile.

Finally, the Union failed to show that it could not contact more employees based on the outdated employee list in its possession. Specifically, there is no evidence that the Union attempted to communicate with the 253 employees who had moved through mailings requesting an address correction and that the mailings be forwarded. Since the Union could have contacted additional listed employees using this method, resort to the list cannot be deemed futile.

D.The Union's Failure to Resort to Mass Media is Not a Factor in this Decision

Our conclusion in this matter is not based on the Union's failure to resort to mass media. However, we note that although the Union's consultant and one of its organizers provided reasons why the use of billboards, radio spots, and newspapers would be ineffective, the Union provided no data regarding the cost of such media advertisements.

CONCLUSION

For these reasons, we conclude that, absent withdrawal, the Region should dismiss the charge because the Union has not demonstrated that it cannot reach a sufficient number of employees to achieve a necessary showing of interest in the representation proceeding which would entitle the Union to a list of names and addresses of all employees. Specifically, given the Union's prior success in identifying and contacting employees by recording license plates entering the Employer's offices, outside the Employer's offices, and contacting employees on the outdated list, and given the Union's lack of evidence that such means or other available means will not be successful in the future, the Union failed to show that the employees are: (1) inaccessible to the Union and other employees based on their geographic dispersion and working organization; and (2) otherwise impossible to organize.

B.J.K.

DATE:

¹ In our previous Advice Memorandum dated December 31, 1997, at 6, we returned the matter to the Region for further investigation of (1) whether the Union's previous organizing methods are no longer effective and (2) whether other methods of communication are unavailable to the Union or are economically infeasible, in light of the Board's decision in Technology Service Solutions, 324 NLRB No. 49 (Aug. 22, 1997).

² The remainder of the employees, including most of the employees working out of the Hillsboro and St. Charles offices, receive their checks by mail.

³ The Employer does not conduct any employee-wide meetings.

⁴ All dates refer to 1997 unless otherwise noted.

⁵ Although the Union now agrees that all three offices constitute the appropriate unit, the representation petition remains blocked by Case 14-CA-24662, filed on July 14, alleging various Section 8(a)(1) violations. The Section 8(a)(1) charge is pending in the Office of Appeals on the Union's appeal of a unilateral settlement.

⁶ 112 of the signed authorization cards were for employees of the Olivette office. The remaining ten cards were signed by employees reporting to the St. Charles office.

⁷ At that time, the Union was unaware of any Employer offices other than Olivette.

⁸ The Union did not indicate how it learned that 253 employees had moved, although it may be inferred that it did so through home visits. There is no evidence the Union attempted to reach these employees by mail, or to obtain forwarding addresses from the Postal Service.

⁹ The Union ultimately contacted 102 of the 428 current employees on the outdated list based on the 175 current addresses of current employees.

¹⁰ The Union had obtained a list of the Employer's clients from the Employer's trash, but the Employer advised its clients not to talk to the Union.

¹¹ On January 27, 1998, the Employer again informed a non-employee Union organizer not to come onto the Olivette property. The police were not called.

¹² Apparently, the Union no longer requests telephone numbers of these employees.

¹³ The Region recently informed us that a Union representative handbilled at the Hillsboro office on February 6, 1998. He was able to give handbills to the five Employer employees who came to that office that day.

¹⁴ Excelsior Underwear, Inc., 156 NLRB 1236, 1239-40 (1966).

¹⁵ Id. at 1240-41.

¹⁶ 324 NLRB No. 49, slip op. at 4 (Aug. 22, 1997).

¹⁷ The union in Technology Service Solutions had filed a representation petition based on a showing of interest in one state. Subsequently, based on employer objections, the Board found that the appropriate unit consisted of an eight-state region. 324 NLRB No. 49, slip op. at 2.

¹⁸ Id., slip op. at 5.

¹⁹ Id., slip op. at 6-7.

²⁰ Id. slip op. at 6. In so concluding, the Chairman cited *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972), for the proposition that employees have both the right to discuss organization with union officials, and the right to discuss organization among themselves.

²¹ Technology Service Solutions, slip op. at 7. The Chairman reiterated his position that an employer's denial of an organizing union's request for a list of employee names and addresses constitutes a prima facie violation of Section 8(a)(1) where employees are dispersed and isolated due to employees' statutory right to learn of the advantages of self-organization from union representatives and to discuss it among themselves. See *Eldorado Tool*, 325 NLRB No. 16 (Nov. 9, 1997) (Gould, Chairman, concurring), slip op. at 4, 6 (Board held that employer's "UAW wall of shame" violated Section 8(a)(1)).

²² See supra at 7 n.20.

²³ Employees live in 7 counties, but only work in a 3-county area.

²⁴ 324 NLRB No. 49, slip op. at 1-3.

²⁵ Id.

²⁶ Likewise, the facts in the instant matter significantly differ from those in *Okanogan County Senior Citizens Ass'n*, 19-CA-24090, Advice Memorandum dated Apr. 15, 1996, where we advised the Region to issue complaint based on the employer's refusal to provide the union a list of employee names and addresses prior to an election for purposes of organizing. In *Okanogan*, the employer employed 300 home care workers to work in clients' locations in 6 rural counties, the employees rarely came into the Employer's office, most checks were mailed to employees, no training sessions were held in the employer's office, and the union received no employee response from radio and newspaper advertisements. Significantly, when the union visited the employer's office on numerous instances, it never observed any employees entering or leaving. This latter fact alone distinguishes *Okanogan* from the instant case, as on just one day the Union here observed nearly 200 employees entering and leaving the Employer's offices.

²⁷ 324 NLRB No. 49, slip op. at 2.

²⁸ Even deducting the 22 former employees who signed authorization cards, the Union still personally contacted at least 141 current employees through its organizing efforts.

²⁹ Applying the Union's 84% signed card-to-contact rate, the Union contacted 16 employees to obtain the additional 14 signed authorization cards. In sum, then, the Union's license plate drives resulted in 53 employee contacts.

³⁰ As we noted in *Technology Service Solutions*, 27-CA-13971, Advice Memorandum dated Apr. 12, 1996, at n.22, the Board's property access cases are analogous, but not binding.

³¹ *Lechmere, Inc v. NLRB*, 502 U.S. 527, 540 (1992).

³² *Id.*

³³ *Hardee's Food Systems, Inc.*, 294 NLRB 643, 644 (1989), review denied 904 F.2d 715 (D.C. Cir. 1990) (the Board denied the union access to the employer's property for handbilling where reasonable alternative means of communication were available).

³⁴ *SCNO Barge Lines, Inc.*, 287 NLRB 169, 169, 171 (1987), review denied, 867 F.2d 767 (2d Cir. 1989).

³⁵ *Id.* at 169, 171.

³⁶ *Id.* at 171.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Instead, the Union cited its "low contact rate" as a reason for discontinuing its license plate checks. This rationale is invalid, as a union not entitled to the most effective or successful means of communicating with employees. *Hardee's*, 294 NLRB at 643-44; *Lechmere*, 295 NLRB 92, 93, 99 (1989), *enf'd* 914 F.2d 313 (1st Cir. 1990), *rev'd* on other grounds 502 U.S. 527 (1992); *SCNO Barge Lines*, 287 NLRB at 172 n.24.

⁴⁰ 222 NLRB 1089, 1090 (1976).

⁴¹ *Postal Service*, 318 NLRB 466, 466 (1995) (citing *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976)). In *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803-04 n.10 (1945), the Court upheld Board law holding that off-duty employee solicitations are presumptively valid, citing *Peyton Packing Co.*, 49 NLRB 828, 843-44 (1943):

[T]ime outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.

Unlike off-duty employees, non-employees seeking employer access are governed by *Lechmere*, see *infra* at 11 n.31, which as an initial matter requires proof of lack of any reasonable alternative means of communication. See *Postal Service*, 318 NLRB at 466.